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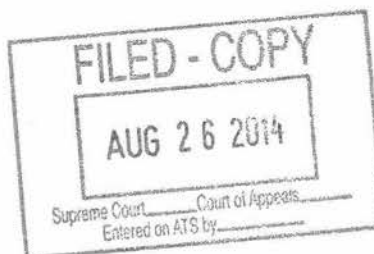
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No. 41701

Bingham Co. Case No.
CV-2013-1161

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM

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PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Waldimar George Witt, *pro se*, appeals from the district court's order summarily dismissing his fourth successive petition for post-conviction relief.

Statement of Facts and Course of Prior Post-Conviction Proceedings

The underlying facts of this case have been outlined by the Court of Appeals in State v. Witt, 2001 Unpublished Opinion No. 796, *1 (Idaho App. Aug. 30, 2001):

Waldimar George Witt was convicted of two counts of statutory rape, Idaho Code § 18-6106, and one count of sexual battery of a minor child sixteen or seventeen years of age, Idaho Code § 18-1508A. The district court sentenced Witt to unified fifteen-year sentences with five years determinate for the rape counts and a concurrent unified ten-year sentence with a three-year determinate term for sexual battery.

The Court of Appeals affirmed Witt's sentence. Id.

Witt timely filed his first petition for post-conviction relief in 2001. (R., p.202.) The district court summarily dismissed it. (Id.)

Witt filed a subsequent petition for post-conviction relief asserting his counsel was ineffective for failing to introduce physical evidence proving Witt had raped his victim or had admitted to having sex with his victim. Witt v. State, 2003 Unpublished Opinion No. 641, *1 (Idaho App. April 17, 2003). The district court granted the state's motion and summarily dismissed Witt's second petition for post-conviction relief. Id. at *2. The Court of Appeals affirmed the summary dismissal. Id. at *3.

Witt filed a third petition for post-conviction relief in 2002. (R., p.202.) Final judgment was entered against Witt and a subsequent appeal was dismissed. (Id.)

Statement of the Facts and Course of Witt's Fourth, Successive Post-Conviction Proceedings

Witt filed this, his fourth, successive *pro se* petition for post-conviction relief on June 13, 2013. (R., pp.5-11.) In it, Witt asserted ineffective assistance of counsel for failure to "require proof of penetration," and failure to attack the testimony of the investigator and other witnesses. (R., p.7.)

The state filed an answer and motion for summary dismissal of Witt's successive petition for post-conviction relief asserting, among other things, that Witt's petition was time-barred. (R., pp.88-90, 120-133.) The district court entered an order summarily dismissing Witt's fourth, successive petition for post-conviction relief finding it was untimely filed. (R., pp.201-204.)

Witt timely appealed from the final judgment of dismissal of his fourth successive petition for post-conviction relief. (R., pp.205-212.)

ISSUE

Contrary to I.A.R. 35(a)(4), Witt's brief does not contain a list of issues on appeal.

The state phrases the issue on appeal as:

Has Witt failed to establish the district court erred in summarily dismissing his fourth successive petition for post-conviction relief?

ARGUMENT

Witt Has Failed To Show Error In The Summary Dismissal Of His Successive Petition For Post-Conviction Relief

A. Introduction

The district court summarily dismissed Witt's successive petition for post-conviction relief after concluding it was untimely. (R., p.203.) On appeal, Witt does not assert he was entitled to the equitable tolling of the time period in which to file his petition for post-conviction relief nor does he assert the district court erred in summarily dismissing his successive petition. (See generally, Appellant's brief.) In fact, Witt appears to concede his petition is untimely and instead continues to try to advance his arguments made unsuccessfully below. (Appellant's brief, p.15 ("the Appeal that is before the Honorable Court is not properly before the Court on a time restraint issue. . .").) Witt has failed to show error in the district court's dismissal of his successive petition for post-conviction relief.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State,

132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Dismissal Of Witt's Fourth Successive Petition For Post-Conviction Relief Was Appropriate Because It Was Untimely Filed And Witt Failed To Allege Facts That, If True, Would Toll Application Of The Statute Of Limitations

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant's evidence has raised no genuine issue of material fact, which if resolved in the applicant's favor, would entitle the

applicant to the requested relief. Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it appears that the applicant is not entitled to relief. Specifically, I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Applying these principles in this case, the district court summarily dismissed Witt's petition as untimely.

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. § 19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). In those circumstances, the court will apply a "reasonable time" standard. Rhoades, 148 Idaho at 251, 220 P.3d at 1070. "In determining what a reasonable time is for filing a successive petition, [the court] will simply

consider it on a case-by-case basis, as has been done in capital cases.” Charboneau, 144 Idaho at 905, 174 P.3d at 875. However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho at 247, 220 P.3d at 1066.

The only three circumstances in which Idaho recognizes equitable tolling are: (1) “where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials,” Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003). (2) “where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction,” Id.; and (3) where there are “claims which simply [were] not known to the defendant within the time limit, yet raise important due process issues,” Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). Witt did not allege any of the foregoing bases as a reason to toll the limitation period for filing his petition. (See generally Appellant’s brief.) The district court correctly concluded Witt’s petition was untimely filed:

Here, the Remittitur in the criminal case is dated April 19, 2004. The one year period for filing a Petition for Post-Conviction Relief expired on April 20, 2005. Witt’s original Petition, 2nd Petition, and 3rd Petition were all timely filed. This 4th Petition is not timely.

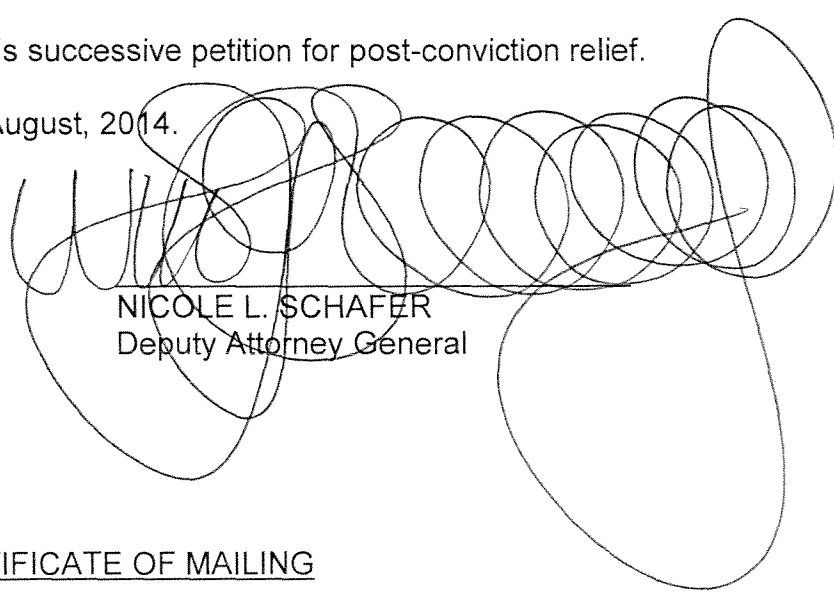
(R., p.203.)

The district court correctly dismissed Witt's successive petition for post-conviction relief on the ground that it did not meet the statutory requirements for a permissible successive petition under I.C. § 19-4908.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Witt's successive petition for post-conviction relief.

DATED this 26th day of August, 2014.

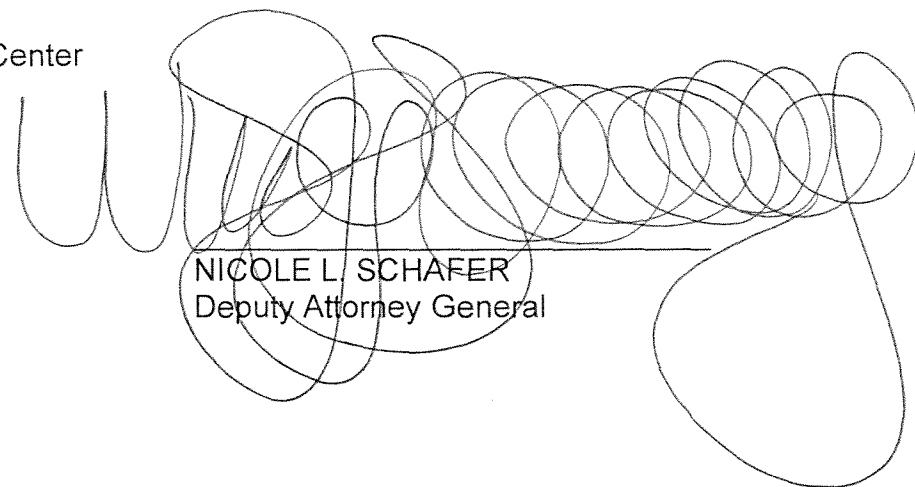


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of August 2014, I caused two true and correct copies of the foregoing REPLY BRIEF to be placed in the United States mail, postage prepaid, addressed to:

WALDIMAR GEORGE WITT
Inmate # 61011
Idaho Correctional Center
P.O. Box 70010
Boise, ID 83707



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm